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Kretschmer, M. (2012) Copyright term reversion and the 'use-it-or-lose-it' principle. *International Journal of Music Business Research*, 1 (1). pp. 44-53. ISSN 2227-5789

<http://eprints.gla.ac.uk/71442>

Deposited on: 5 November 2012

Short Paper: Copyright Term Reversion and the "Use-It-Or-Lose-It" Principle

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Abstract

This brief article makes an argument for the use of the legal device of term reversion, as a means for bringing unexploited works back into use, and mitigating the undesirable effects of the excessive term of copyright protection. It proposes to legislate a simple rule that copyright interests will be transferable only for an initial term of 10 years, after which they will revert to the creator. If carefully implemented, the rule is compatible with the current constraints of international and EU law. By stimulating artist-led innovation, term reversion may also improve the financial position of creators.

Keywords: copyright, copyright term, term reversion

1 Context: Excessive Copyright

Copyright law awards exclusive rights that now often last more than 100 years.² Typically, these rights are transferred by authors to third parties

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² The Berne Convention for the Protection of Literary and Artistic Works (1886) prescribes a term of life of author plus 50 years (the latest version of the Berne Convention is the Paris Act 1971, as amended in 1979). The U.S. acceded to Berne in 1989. In 1994, the Berne Convention was integrated into the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) that is all 153 members of the World Trade Organization (as of 10 February 2011) are now bound by it. The EU Copyright term was harmonized to life plus 70 years with the 1993 Council Directive (93/98/EEC, codified as 2006/116/EC). The U.S. Sonny Bono Copyright Extension Act (1998) extended the term by 20 years to life plus 70 years, or 95 years for "works for hire" (works created under employment by corporations). In Europe, sound recordings, broadcasts and performances are only protected as neighbouring or "related rights". For phonogram producers and performers on music recordings, the term will change from 50 to 70 years with the implementation of the 2011 Copyright Extension Directive amending Directive 2006/116/EC (2011/77/EU).

who accumulate back-catalogues of rights. A large percentage of works in these back-catalogues are not available for cultural, social and commercial innovation. We have reliable indicators of the scale of the problem. Studies conducted in the United States at the time of the constitutional challenge to the Copyright Term Extension Act³ found that only 2.3% of in-copyright books and 6.8% of in-copyright films released pre-1946 remained commercially available (Mulligan & Schultz 2002).⁴ A study for the Library of Congress on the reissues of U.S. sound recordings found that of a random sample of 1521 records issued between 1890 and 1964, only 14 percent were available from rights owners (Brooks 2005). For a large number of in-copyright books (the European estimates differ between 13% and 43%), the owner is unknown.⁵ For photographic collections of museums and archives, the numbers rise to 90% of all items.⁶ These so-called "orphan works" could not be lawfully reissued even if the will was there. The concentration of back-catalogues of rights in an oligopolistic industry structure (as an unintended side-effect of copyright law) may also create a barrier to entry for new firms and artists (Tschmuck 2009).

It is an empirical question what length of term would provide sufficient incentives for the production and distribution of culture. Some have argued that the correct approach to setting the copyright term would be to reduce it step by step, until creative production starts to fall: *"Ten years may still be longer than necessary"* (Stallman: 2010). By way of contrast, consider the regulatory approach underlying the first

³ Eldred v. Ashcroft, 537 U.S. 186 (2003).

⁴ In the United States, works published between 1927 and 1946 would have fallen out of copyright under the earlier (pre-1976) term of 56 years if the constitutional challenge had been successful. Landes and Posner (2003a: 212) analyse data from the American Library Annual and Book Trade Almanac for 1872–1957, and find that of 10,027 books published in the USA in 1930, only 174 (1.7%) were still in print in 2001.

⁵ The 13% figure is a "conservative" estimate from a study for the European Commission (Vuopala 2010). A rights clearance study for the British Library produced orphan figures of 31% for all books in the sample, and 43% for the sub-sample of "in-copyright" books (Stratton 2011).

⁶ *"The Chair of the Museum Copyright Group, Peter Wienard, believes that from the total collection of photographs of 70 institutions (around 19 million), the percentage of photographs where the author is known (other than for fine art photographs) is 10 per cent"* (Gowers Review of Intellectual Property 2006: 69).

UK Design Copyright of 1787.⁷ The Act created an exclusive right of two months for "new and original" patterns on linens, cottons, calicoes and muslins, securing innovators a short lead-time in the market.

Empirical data indicate that the investment horizon in cultural industries is well below 10 years (Breyer 1970-71). There is also compelling evidence that the most intensive commercial exploitation takes place at the beginning and the end of the exclusive term (St Clair 2004, Höffner 2010). However, setting a term that rationally balances under-production and under-use of copyright works is closed as a policy option, as international and European law stands. Still, the idea that works that are not being exploited should lose protection to the degree they can be used by others is consistent with general principles of law.⁸ This is where the concept of term reversion becomes fruitful: limiting the time for which copyright interests can be assigned, after which they revert to where they came from. Term reversion could be a key tool for opening up unexploited back-catalogues, and enable artist-led cultural and social innovation.

2 The proposal

It is proposed to legislate a simple rule that copyright interests will be transferable only for an initial term of 10 years, after which they will revert to the creator. After 10 years, authors would have the choice of –

- (i) re-assigning or re-licensing their work if there is still demand,
- (ii) joining a collective management scheme (converting in effect the exclusive right into a right to remuneration), or

⁷ An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the Properties thereof, in the Designers, Printers and Proprietors, for a limited time (1787, 27 Geo.III, c.38. – <http://www.copyrighthistory.org/>).

⁸ We find similar principles in the law of real property (landowner may lose title if rights are not asserted), in competition law (compulsory licences), contract law (revision and termination), even patent law: there is a provision in the UK Patent Act 1977 (s.48B(1)) that allows the issue of compulsory licences "*where the patented invention is capable of being commercially worked in the United Kingdom, that it is not being so worked or is not being so worked to the fullest extent that is reasonably practicable.*"

(iii) abandoning the work.⁹

Term reversion would be compatible with international and EU law, as the term itself would not be affected. Objections that the measure would constitute a limitation that prejudices the legitimate interests of the "right holder" contrary to Article 13 of the TRIPS Agreement apply equally to many common law, civil law and competition law interventions affecting copyright contracts.¹⁰ They can be overcome.¹¹

The challenge for the legislator will be to create a simple and transparent scheme providing incentives to creators to convert reverted, non-exploited rights into non-exclusive licences after a fixed period. Only in combination with such a measure will term reversion free back-catalogues, while remaining compatible with international law.¹² Any reversion scheme needs to result in absolute clarity about the location of rights. At the very least, this requires making the reversion inalienable (i.e. reversion cannot be subverted by a contract), and some kind of register.¹³ Such a scheme would reduce the frictional costs of licensing for both exploited and non-exploited works. It also would have the advan-

⁹ It is contentious whether it is possible to abandon personal property in law, and the treatment varies by jurisdiction (Hudson & Burrell 2010).

¹⁰ Many civil law countries have provisions that allow authors to recall rights in certain circumstances: Under §41 of the German UrhG, there is a right to recall (Rückrufsrecht) because of insufficient exploitation. Our study for the UK Strategic Advisory Board for Intellectual Property Policy (SABIP) summarises the jurisprudence relating to the revision and termination of contracts (Kretschmer et al. 2010).

¹¹ In this context, it is also useful to consider the requirement of use for trade marks circumscribed by TRIPS Article 19: *"If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use."* Countries seem to have found few difficulties creating a reliable process for the revocation of these property rights.

¹² Extended collective licensing clearly is compatible with international law. Even compulsory collective management may be: Article 9 of the Cable and Satellite Directive 93/83/EEC imposes compulsory collective management for the *"exercise of the cable retransmission right"*.

¹³ Stef van Gompel (2011) analyses to what extent the benefits of registration can be reconciled with the elimination of formalities by the Berne Convention (Berlin revision 1908).

tage of being compatible with several proposed solutions to the orphan works problem (Hansen 2011).

Drafting techniques that may be used in framing term reversion include:¹⁴

- Automatic reversion "notwithstanding any agreement to the contrary";
- Continued exploitation of derivative works created prior to term reversion;
- Special arrangements for works first owned by corporate authors;
- Provisions to solve the coordination problem for works of multiple authorship ("Where the authors are unable or unwilling to act in concert, the rights must be vested in a collecting society");
- (Opt-out) licensing schemes for works demonstrably published before a certain date.

¹⁴ A good source of drafting language is the U.S. Report of the Register of Copyrights on the General Revision of U.S. Copyright Law and the preliminary copyright draft bill of 1964. Useful "use-it-or-lose-it" language is included in the EU's (otherwise unfortunate) 2011 Term Extension Directive for Sound Recordings (2011/77/EU). Art. 1(2a) reads: "If, 50 years after the phonogram was lawfully published or, failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract by which the performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter a "contract on transfer or assignment"). The right to terminate the contract on transfer or assignment may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract on transfer or assignment pursuant to the previous sentence, fails to carry out both of the acts of exploitation referred to in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire."

3 Projected effects of term reversion

The political attraction of term reversion is that it is able to combine a "use-it-or-lose-it" principle (implied in many branches of legal doctrine), with economic appeal. For example, reversion overcomes the well-known economic problem of valuation of copyright by allowing the market to work in the "future". The present value of a shorter term is likely to offer a greater economic incentive to the original creator, whereas a longer term favours incumbent commercial exploiters (Landes & Posner 2003a: chapter 8 and 2003b).¹⁵ There is disagreement whether term reversion will be financially advantageous for creators. For example, Raustiala & Sprigman (2011) argue: *"Because buyers can expect, on average, to make lower profits when the law contains the termination provision, they will offer less in the initial transaction. Thus, sellers will be more willing to accept less, because they know that if a work later proves valuable, they can terminate and demand some additional payment. So the most likely effect of the termination provision is to force deal prices down across the board"*. As with many arguments in the law and economics literature on copyright, this is based on a plausible sounding theoretical proposition that ignores the dynamic effects of subsequent innovation from un-locking underused back-catalogues.¹⁶

10 years after publication, there is only a small number of works for which there is still demand. These would remain on the market, as a new set of exploitation contracts would be negotiated, based on more accurate expectations of future earnings. For the majority of works, after 10 years no investor will be willing to take the risk of further market-

¹⁵ George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser (2002), "Brief as Amici Curiae in Support of Petitioners", *Eric Eldred et al v. John D. Ashcroft, Attorney General*, the Supreme Court of the United States of America, No. 01-618

¹⁶ Boldrin & Levine (2002: 210) characterise copyright and patents which control subsequent use as a distortion of property rights: *"When you buy a potato you can eat it, throw it away, plant it, or make it into a sculpture. Current law allows producers of CDs and books to take this freedom away from you. When you buy a potato you can use the 'idea' of a potato embodied in it to make better potatoes or to invent French fries. Current law allows producers of computer software or medical drugs to take this freedom away from you."*

ing and distribution expense. Under current legal arrangements, these works would now sit in the back-catalogue, possibly out of print, possibly within an on-demand database, waiting for something to happen. However, if term reversion kicks in, decisions will have to be made, both by the original creator and the first exploiter. The creator may see a different, innovative avenue for exclusive re-use, or may prefer to offer the work under a standard non-exclusive licence that could be accepted by any taker. The latter option is likely to adapt the familiar model of collective management to a wider range of uses.

Lessons need to be learned from previous experiences with term reversion. Under the Statute of Anne of 1710, copyright went back to the author after a term of 14 years who could then assign it again for one further term.¹⁷ There is little evidence that much use was made of this provision. Authors continued to assign copyright outright by a contract that included the second term.¹⁸ The United States followed a similar structure until the 1976 Copyright Act, with an initial copyright term of 28 years that could be renewed once. In the 1976 Act, Congress introduced an inalienable termination right for authors after a period of 35 years (for all grants of rights after 1977).¹⁹ There are many practical difficulties with both the old and the new mechanism. The provisions may turn out to be a rhetorical nod, with little practical use for improv-

¹⁷ An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c.19. (<http://www.copyrighthistory.org/>). The last section reads: "Provided always that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the Authors thereof if they are then living for another Term of fourteen years." The original parchment copy of the act shows that the section was tacked on as a late addition in the legislative process. Deazley (2004: 43) argues that the divided term was intended "to benefit the author and only the author". He also shows that the 10 year assignment concept was first mooted in a 1737 Bill for the Better Encouragement of Learning:

¹⁸ Bently & Ginsburg (2011: 1493) trace 18th century jurisprudence to the effect that the second term could only be assigned by an express term. Few authors appear to have taken advantage of the reversionary right.

¹⁹ Under § 203 of the U.S. Copyright Act of 1976, 17 U.S.C. ("Termination of transfers and licenses granted by the author"), termination notices can begin in 2003, with the earliest reversion possible in 2013 (for copyrights acquired in 1978). For copyrights acquired before 1978, term reversion is possible after 56 years (§ 304 "Duration of copyright: Subsisting copyrights"). Transitional measures are too complex to summarise here.

ing the bargaining position of authors, nor for opening up back-catalogues.²⁰ The introduction of term reversion would have to be prospective, i.e. it could only affect future copyright contracts. So existing works for which there is no longer demand would remain locked for the foreseeable future. Still, innovation effects would be felt immediately. Modes of exploitation would change (as the incentives against warehousing of rights start to bite).

4 Concluding thought

The current focus of liberal reform initiatives is on the scope of grant, i.e. regulating the activities that can be permitted without the consent of the copyright owner in a more coherent manner.²¹ The argument in this article suggests that a complementary solution would be to break up the excessively long copyright term. Politically this is achievable if creators and consumers see the joint benefits of facilitating innovation in a copyright industry structure that currently favours incumbent owners of large back-catalogues. Rather than framing the debate as a stand-off between right owners (creators and investors) and users over issues of enforcement, term reversion offers creators the opportunity to reconsider the gains from unanticipated re-use, and enter a coalition with consumer interests. In my view, it is one of the last openings for reforming copyright law from within.

²⁰ Since application of the provisions is uncertain (in particular in relation to sound recordings), a wave of litigation is currently making its way through the U.S. courts (Menell & Nimmer 2010).

²¹ Examples include the UK's proposal for a new exception for data and text mining (Hargreaves Review, chapter 5: Copyright: Exceptions for the Digital Age); the EU's draft orphan works legislation (Commission Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works, COM (2011) 289 final (24 May, 2011)); and WIPO's focus on print disabilities ("Working document on an international instrument on limitations and exceptions for visually impaired persons/persons with print disabilities" (document SCCR/23/7), Standing Committee on Copyright and Related Rights (SCCR) Twenty-Third Session Geneva, November 21 to 25, 28, 29 and December 2, 2011).

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